STATE OF MICHIGAN

COURT OF APPEALS

DAVID DARITY, Personal Representative of the Estate of FRANK DARITY, Deceased,

Plaintiff-Appellee,

v

CITY OF FLAT ROCK,

Defendant/Cross-Plaintiff-Appellant,

and

SCHEEL'S CONCRETE, INC.,

Defendant/Cross-Defendant,

and

COUNTY OF WAYNE,

Defendant.

UNPUBLISHED
February 21, 2006

No. 256481
Wayne Circuit Court
LC No. 03-317616-NO

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Plaintiff's decedent suffered fatal head injuries when his head struck a guardrail after his bicycle flipped as he rode along a sidewalk allegedly covered with sand, gravel, dirt, and other debris. The sidewalk was adjacent to Telegraph Road, which is state trunkline highway US-24. Plaintiff commenced this action against the city of Flat Rock, the county of Wayne, and the Michigan Department of Transportation, relying on the highway exception to governmental immunity, MCL 691.1402. Defendant city moved for summary disposition on the basis that it did not have jurisdiction over the sidewalk. It appeals as of right from the circuit court's order denying its motion. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant[1] argues that because it does not have jurisdiction over US-24, it does not have jurisdiction over the sidewalk at issue, and therefore the highway exception to governmental immunity does not apply.

Determination of the applicability of the highway exception to governmental immunity is a question of law subject to de novo review. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000).

The highway exception to governmental immunity, MCL 691.1402(1), requires a governmental agency to maintain a highway under its jurisdiction "in reasonable repair so that it is reasonably safe and convenient for public travel." The definition of "highway" includes sidewalks, trailways, and crosswalks. MCL 691.1401(e). However, the state and county road commissions' duty to repair and maintain does not extend to those areas:

> The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. [MCL 691.1402(1).]

Thus, the state and county road commission had no duty to repair and maintain the sidewalk adjacent to state trunkline US-24.

However, the Michigan Supreme Court has explained that the highway exception does not explicitly establish local government liability for sidewalks abutting state or county roads:

> [T]he [highway] exception limits the liability of the state and counties to the improved portion of the road designed for vehicular travel, and provides that they will not be liable for sidewalks that abut these roads. However, the statute does not explicitly provide that local governmental agencies are liable for sidewalks abutting state or county roads within their boundaries. [*Listanski v Canton Twp*, 452 Mich 678, 686; 551 NW2d 98 (1996).]

The liability of a city for a sidewalk abutting a state trunkline highway is addressed in *Jones v Ypsilanti*, 26 Mich App 574; 182 NW2d 795 (1970). In *Jones*, the plaintiff was injured on a sidewalk adjoining Michigan Avenue, a state trunkline highway, and brought an action against the city for failing to maintain the sidewalk. *Id*. at 575. The city argued that the state had exclusive jurisdiction over, and accepted all legal responsibility for, state trunkline highways, and because "highway" was defined to include the sidewalk, the city had no responsibility for defects in sidewalks adjacent to state trunkline highways. *Id*. at 576. This Court explained that the municipality "retain[ed] reasonable control over state trunkline highways located within their boundaries so long as that control pertains to local concerns and does not conflict with the

[1] The singular "defendant" is used to refer to the city of Flat Rock, which is the only defendant participating in this appeal.

paramount jurisdiction of the state highway commission." *Id*. at 580. This Court further explained that in enacting 1964 PA 170, which revised governmental tort liability, the Legislature "provided by law that the jurisdiction and control of the state with regard to maintenance and liability extends only to the portion used for vehicular travel. It left the sidewalks to the reasonable control of the cities pursuant to art 7, § 29." *Id*. at 581. Therefore, the Court concluded that the city was responsible for maintenance of the sidewalk abutting the state trunkline highway.

In *Listanski, supra* at 684-688, the Supreme Court addressed whether townships were liable for sidewalks adjacent to county roads and approved this Court's reasoning in *Jones*. The Court recognized that cities are responsible and liable for sidewalks along state and county roads. *Listanski*, *supra* at 684, 686-687 n 10, 689-690. The Court concluded that "townships are liable for injuries occurring on sidewalks that abut state or county roads as a result of their negligent failure to maintain their sidewalks in reasonable repair." *Id*. at 690. The Court explained that its conclusion "treats townships the same as cities . . . ." *Id*. at 691.

Defendant argues that because the sidewalk is within the right-of-way of a state highway, the highway is under the jurisdiction of the state, and only one governmental agency may have jurisdiction. Defendant cites *Markillie v Livingston Co Rd Comm'rs*, 210 Mich App 16, 20; 532 NW2d 878 (1995) and *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 632; 415 NW2d 224 (1987) as support for its argument that only one governmental agency may have jurisdiction. Both of those cases concerned the distinct issue of jurisdiction at state highway intersections and do not address jurisdiction outside the improved portion of a highway. See *Listanski, supra*, pp 688-690, and cases cited therein.[2]

Defendant argues that this Court should follow *Dittmar v City of Flint*, 374 Mich 688, 691; 133 NW2d 197 (1965), in which the Court held that a city did not have jurisdiction over a sidewalk located in the right-of-way of a state trunkline. The Court in *Dittmar* relied in part on MCL 250.61, which provides:

> On and after January 1, 1960, the cost of constructing, improving and maintaining trunk line highways shall be met entirely by the state, and the counties, townships and incorporated cities and villages shall thereafter be relieved of all expenses and legal liabilities in connection therewith as imposed by section 21 of chapter 4 and chapter 22 of Act No. 283 of the Public Acts of 1909, as amended, being section 224.21 and sections 242.1 to 242.8 of the Compiled Laws of 1948. [*Dittmar*, *supra* at 691.]

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[2] The pronouncement in *Markillie, supra* at 20, that only one governmental agency can have jurisdiction over a highway has been reiterated with respect to areas where state highways intersect a highway of one of its political subdivisions, see *Carr v City of Lansing*, 259 Mich App 376, 381; 674 NW2d 168 (2003), and also to a crosswalk in the improved portion of a county road, see *Sebring v City of Berkley*, 247 Mich App 666, 684; 637 NW2d 552 (2001).

This Court addressed *Dittmar* and MCL 250.61 in *Jones, supra* at 576-577, 581-582. There the Court explained that the city's reliance on *Dittmar* was misplaced, inasmuch as that decision arose before the effective date of 1964 PA 170 (which revised governmental tort liability) and did not consider the changes. *Id*. at 581-582. The Court also explained why the relief from liability conferred by MCL 250.61 was no longer material to the analysis of governmental immunity. Specifically, the relief afforded by that provision was for "all expenses and legal liabilities in connection therewith as imposed by section 21 of chapter 4 and chapter 22 of Act No. 283 of the Public Acts of 1909, as amended, being section 224.21 and sections 242.1 to 242.8 of the Compiled Laws of 1948." *Jones, supra* at 577, quoting MCL 250.61. However, the referenced provisions were repealed by 1964 PA 170. Thus, the immunity from liability under those provisions is meaningless because the provisions are no longer in effect. *Id*. at 578.

Defendant argues that the decision in *Jones* is flawed because the Court mistakenly stated that MCL 250.61 had been repealed, when in fact that provision was still valid and is often cited. Defendant misreads *Jones*. The Court did not state that MCL 250.61 had been repealed, but rather that the "exclusion as to cities provided by the 1959 amendment [to MCL 250.61], no longer exists; the specific source of that exclusion has been repealed." *Jones, supra* at 578. MCL 250.61 remains in effect, but the protection it affords from liability pursuant to provisions that were repealed does not preclude defendant's liability in this case.

Defendant also relies on MCL 691.1402a in support of its argument that the Legislature rendered cities liable only for sidewalks adjacent to *county* highways.

MCL 691.1402a(1) provides that a municipal corporation has no duty to repair or maintain portions of a county highway outside the improved portion of the highway unless certain requirements are met:

> Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a *county* highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
>
> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.
>
> (b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage. [Emphasis added.]

The statute further provides a rebuttable inference of reasonable repair by the municipal corporation where a discontinuity defect is less than two inches. MCL 691.1402a(2).

Because the sidewalk at issue was adjacent to a state trunkline and not a county road, MCL 691.1402a does not govern this action. Yet defendant argues that the statute is significant

because it was adopted in response to *Listanski*, *supra*, and although that decision addressed both state and county roads, the Legislature rendered municipalities liable only for those sidewalks within a county highway.

The statute does not support defendant's position. MCL 691.1402a "creates no liability for municipalities that would not otherwise exist. . . . The obvious purpose of § 1402a is to limit the liability municipalities would otherwise face to maintain sidewalks . . . ." *Carr v City of Lansing*, 259 Mich App 376, 380; 674 NW2d 168 (2003). In enacting MCL 691.1402a, the Legislature implicitly recognized that by virtue of MCL 691.1402, municipal corporations faced liability for portions of county highways that were outside the improved portion designed for vehicular travel. MCL 691.1402 does not provide a basis for concluding that municipal corporations have a lesser degree of liability with respect to portions of state highways that are outside the improved portion designed for vehicular travel. Yet in enacting MCL 691.1402a, the Legislature decided to limit liability with respect to county roads only. The Legislature's failure to impose similar limits with respect to state roads does not suggest that the Legislature was unaware of that liability or did not intend that liability would exist. Rather, the absence of a provision concerning portions of state highways outside the improved portion means that a municipal corporation's liability for those areas pursuant to MCL 691.1402 remains unreduced.

In summary, the trial court correctly denied defendant's motion for summary disposition because, as explained in *Jones*, *supra*, and consistent with *Listanski*, *supra*, defendant had jurisdiction over the sidewalk at issue.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette